

ORIGINAL

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUL 5 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

SOUTHWESTERN BROADCASTING)
CORPORATION)

MM Docket No. 96-104

For Renewal of License for
Station KLZK(FM)
Brownfield, Texas

To: Hon. Richard L. Sippel
Administrative Law Judge

DOCKET FILE COPY ORIGINAL

MOTION FOR SUMMARY DECISION

SOUTHWESTERN BROADCASTING
CORPORATION

Lawrence J. Bernard, Jr.
5227 Chevy-Chase Parkway, N.W.
Washington, D.C. 20015
(202) 237-8215

July 5, 1996

Its Counsel

No. of Copies rec'd
111 ABCDE

016

TABLE OF CONTENTS

	<u>PAGE</u>
I. Introduction	1
II. Statement of the Case	3
A. Southwestern's Acquisition of KLZK	3
B. The Bureau's Authorization to KMMX of Operating Authority in Conflict with the KZLK Upgrade Order	4
C. The Bureau's Authorization to KKYN of Operating Authority in Conflict with KLZK's License to Operate on Channel 280A	6
D. The Steps Taken By Southwestern From 1990 to 1992 to Obtain a Solution to the Problem	6
E. The Bureau's December, 1992 Letter to Southwestern and Southwestern's Efforts to Resolve the Conflict in 1993 and 1994	9
F. The Bureau's Letter of December 1, 1993 (the "Riley Letter") to Southwestern and the Licensees of KMMX and KIOL	11
G. The December 31, 1993 Agreement Between Southwestern and the Licensees of KMMX and KIOL to Resolve the Conflict	13
H. Southwestern's Response to the Riley Letter and Efforts to Obtain Commission Authorization to Implement the Agreement	14
I. Southwestern's Post-Designation Efforts to Return KLZK to the Air Have Been Further Delayed by the Bureau	18
III. Argument	20
A. Southwestern Has the Capability and Intent to Expeditiously Return KZLK to the Air	20

B.	Southwestern Did Not Violate Sections 73.1740 or 73.1750 of the Commission's Rules	21
C.	The Public Interest Would be Served by Grant of the KLZK Renewal Application	22
IV.	Conclusion	23

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUL 5 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

SOUTHWESTERN BROADCASTING)
CORPORATION)

MM Docket No. 96-104

For Renewal of License for
Station KLZK(FM)
Brownfield, Texas

To: Hon. Richard L. Sippel
Administrative Law Judge

DOCKET FILE COPY ORIGINAL

MOTION FOR SUMMARY DECISION

Southwestern Broadcasting Corporation ("Southwestern"), pursuant to 47 C.F.R. § 1.251, hereby respectfully requests the Presiding Judge to issue a Summary Decision resolving issues (1), (2) and (3) designated in the Hearing Designation Order, ("HDO") DA 96-657, released April 29, 1996, in favor of Southwestern and granting the captioned application for renewal of license for Station KZLK (FM), Brownfield, Texas.

In support whereof, the following is shown:

I. Introduction

The HDO was issued by the Assistant Chief, Audio Services Division, of the Mass Media Bureau ("Bureau"), acting pursuant to designated authority. In paragraphs 2, 3 and 4 of the HDO, the Bureau recited what is, as will be demonstrated below, at best an amazingly truncated version of the facts which prevented Southwestern from returning KZLK to the air

from July 1, 1990, when it acquired the silent station, until the present. After reciting its version of the facts, the Bureau stated at paragraph 5 of the HDO that,

The Licensee's failure to return the station to the air since it acquired the facility almost six years ago raises substantial questions as to its capability and interest to resume broadcast operations. In view of the foregoing facts, the licensee's current request for special temporary authority fails to establish that causes beyond Southwestern's control have resulted in the facility's continued silence for this protracted period of time. Therefore, Southwestern is in apparent violation of Sections 73.1740 and 73.1750 of the Commission's Rules. (footnotes omitted)

According to the Bureau, the quoted analysis required designation of the following issues specified in paragraph 6 of the HDO:

- (1) To determine whether Southwestern Broadcasting Corporation has the capability and intent to expeditiously resume the broadcast operations of KLZK(FM), consistent with the Commission's Rules.
- (2) To determine whether Southwestern Broadcasting Corporation has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
- (3) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

Following designation of these issues, the Bureau ordered in paragraph 7 of the HDO that

. . . in the event it is determined that grant of the renewal of license application would serve the public interest, convenience and necessity, the grant will be conditioned on the expeditious resumption of operations, the precise period of time to be established in the hearing. Failure to resume operations within

the time specified in the condition will result in the cancellation of the license and the deletion of the station's call letters.

In an Order, 96M-169, released July 1, 1996, page 2, n. 3, the Presiding Judge ruled that February 9, 1997, would be the date set for fulfilling this condition.^{1/}

In paragraph 8 of the HDO, the Bureau assigned both the burden of proceeding and the burden of proof to Southwestern. The Presiding Judge ruled that Southwestern would be permitted to proceed by Motion for Summary Decision. See Order, supra, p. 3.

II. Statement of the Case

A. Southwestern's Acquisition of KLZK

1. Prior to 1988, KLZK (then KKTC(FM)),^{2/} operated as a Class A station on Channel 280A at Brownfield, Texas. See Letter from Larry D. Eads, former Chief of the Bureau's Audio Services Division, to James P. Riley, Esq. et al. dated December 1, 1993, at pp. 1 and 2-3 (attached hereto as Exhibit A and hereinafter referred to as the "Riley Letter").^{3/} In 1987, the former licensee of KLZK, Brownfield Broadcasting Corp. ("Brownfield") petitioned the Commission for rulemaking to change and upgrade the station's operating frequency to Channel 282C2. Riley Letter pp. 2-3; HDO, ¶ 2. A Notice of

^{1/} The cited Order was issued following a second prehearing conference requested by the Bureau and held on June 27, 1996. As related in the Order, at the second conference, counsel for the Bureau reversed the position he had taken at the first conference, held June 6 1996, and announced that Southwestern's application for a construction permit to make minor changes in KLZK, File No. BPH-960508IA, would not be processed, either expeditiously or otherwise. Southwestern will address the Bureau's stated positions in a response to the Memorandum of Law and Policy which the Presiding Judge ordered the Bureau to file by July 5, 1996.

^{2/} KLZK and other stations are hereinafter referred to by their present call signs.

^{3/} The Riley Letter is cited on p. 2, n. 4 of the HDO as being dated December 2 1993.

Proposed Rulemaking, 3 FCC Rcd 231 proposing the upgrade was adopted by the Chief of the Bureau's Allocation's Branch on December 14, 1987. In 1988 Brownfield advised the Commission that it was suspending operation of KZLK pending action on the upgrade proposal and approval of a subsequent application for permission to relocate the station's transmitter site and increase power on Channel 282C2. HDO, ¶ 2. Brownfield's upgrade proposal for KZLK was adopted by the Bureau's Allocation Branch in a Report and Order (the "KLZK Upgrade Order"), 3 FCC Rcd 6158, on September 28, 1988. HDO, ¶ 2; Riley Letter, p. 3. Although the cited Report and Order granted Brownfield 90 days in which to file a minor change application to implement the upgrade, it did not file such an application until a year later, on October 26, 1989.^{4/} Riley Letter, p. 3.

2. On February 23, 1990, while the 1989 Upgrade Application was pending and KZLK was off the air, Brownfield filed an application seeking Commission consent to assign KZLK to Southwestern. HDO, ¶ 3. Shortly thereafter Brownfield, on March 15, 1990, filed the renewal application which was designated for hearing in the HDO. The assignment application was granted on May 4, 1990 and Southwestern consummated the purchase of KZLK on July 1, 1990. HDO, ¶ 3.

B. The Bureau's Authorization to KMMX of Operating Authority in Conflict with the KZLK Upgrade Order

3. Meanwhile, on March 25, 1988, the Chief of the Bureau's Audio Services Division addressed a letter to Barry Sheridan, Esquire, et al. (the "Sheridan Letter") authorizing station KMMX (then KLSC), Lamesa, Texas to begin operating on Channel

^{4/} This application is hereinafter referenced to as the "1989 Upgrade Application."

284C1, pursuant to a 180 day Special Temporary Authorization ("STA"), with new facilities north of Lamesa, while the Commission processed an application for permanent authority to operate the new facilities. See Riley Letter, p. 2, and the Sheridan Letter attached hereto as Exhibit B.^{5/} Although the Bureau's Audio Services Division seems to have been unaware of it when the Sheridan Letter was issued, the KMMX STA authorized operation on Channel 284C1 at a site which was 49.4 kilometers short-spaced to the site for operation of KLZK on Channel 282C2 described in the KLZK Upgrade Order. See, 47 C.F.R. § 73.207; Riley Letter, p. 3. Moreover, the KMMX STA authorized facilities which were short-spaced by 45.4 kilometers to a Class A operation by KLZK on the same channel. Id.

4. The facilities authorized in the KMMX STA were constructed in 1988, and the KMMX and KIOL frequencies were exchanged shortly thereafter. As a result, KMMX began operating pursuant to the STA on Channel 284C1 at a site North of Lamesa in the summer of 1988. Riley Letter, p. 3. KMMX filed a request for extension of the STA on September 14, 1988, which was granted for a period of 90 additional days on December 1,

^{5/} In the Sheridan Letter, the Bureau granted assignment applications authorizing the licensees of two Lamesa, Texas, FM stations, KIOL (then KUFO) and KMMX (then KLSC) to exchange their licenses and frequencies so that KIOL acquired the right to broadcast on KMMX's former Channel, 262C1, and KMMX acquired the right to broadcast on KIOL's former Channel 284C1. Ex. B; Riley Letter, p. 2. The two licensees had also filed applications requesting permission to relocate their transmitter sites so that KIOL could operate on Channel 262C1 at its existing site south of Lamesa and KMMT could operate on Channel 284C1 at a new site north of Lamesa. The Bureau did not grant the site change applications in the Sheridan Letter, stating that they would be processed in due course. Ex. B. However, the Bureau did issue STA's to both KIOL and KMMX to operate with the facilities requested in those applications. Sheridan Letter, Ex. B, p. 3. Brownfield, KLZK's community of license is located about 32 miles northwest of Lamesa and 35 miles southwest of Lubbock in West Texas. Official notice requested.

1993.^{6/} Riley Letter, p. 5. On February 23, 1994, the Bureau again extended the KMMX STA until June 1, 1994. See February 23, 1994 letter to James P. Riley, Esq. et al. attached hereto as Exhibit C. On March 6, 1996, the Bureau again extended the STA for 180 days, until September 6, 1996. See March 6, 1996 letter to James P. Riley et al. from the Acting Chief of the Bureau's Audio Services Division, attached hereto as Exhibit D.^{7/}

C. The Bureau's Authorization to KKYN of Operating Authority in Conflict with KLZK's License to Operate on Channel 280A

5. In yet another bizarre turn of events, the Bureau's Allocation Branch, in reliance on the KLZK Upgrade Order, authorized KKYN-FM, Plainview, Texas to upgrade its own facilities from Channel 280A to Channel 280C1 on December 27, 1989. Report and Order, 4 FCC Rcd 8788 (MMB 1989). This action and the subsequent grant of an application to implement the KKYN changes precluded KLZK from resuming operations on Channel 280A, as authorized in the license for which renewal has been requested in the application at issue in this proceeding. Riley Letter, p. 5, n. 9.

D. The Steps Taken By Southwestern From 1990 to 1992 to Obtain a Solution to the Problem

6. The foregoing paragraphs demonstrate that the STA operation of KMMX on Channel 284C1 from 1988, before Southwestern acquired KLZK, until June of 1996 precluded KLZK from operating as a Class C station on Channel 282C2, as ordered in

^{6/} The Commission views the filing of a request for STA as automatically extending the STA until final action on the request has been taken. See 5 U.S.C. § 558(c).

^{7/} In the culmination of a series of events described below, the KMMX license was assigned to a new owner and operation pursuant to the STA ceased on or about June 28, 1996. See letter to Commission Secretary from counsel for 100.3 Radio Inc., attached hereto as Exhibit E.

KLZK Upgrade Order or as a Class A station on Channel 282A, which the Bureau seems to claim was an alternative for returning KLZK to the air in paragraph 4 of the HDO.

Moreover, the upgrade of KKYN in December of 1989 precluded KLZK from returning to its pre-1988 licensed facilities on Channel 280A. In other words, Southwestern did not have a channel to operate on, or even propose operations on, until KMMX ceased operations pursuant to its STA in June of 1996. As will be demonstrated below, the Bureau's Audio Services Division became aware of the conflict between its grant of the KMMX STA and the Allocation Branch's grant of the KZLK Upgrade Order at least as early as the fall of 1990, but did little more than encourage the stations involved to negotiate a settlement of the matter and present a solution to the Commission for approval. See ¶ 2 of the Declaration of Thomas J. Crane, president of Southwestern, attached hereto as Exhibit F. ("Crane Decl."). Mr. Crane of Southwestern and various members of the Bureau's staff were involved in the settlement negotiations which took several years to conclude and two more years to receive Commission approval. Meanwhile, Southwestern could not return KLZK to the air, and Mr. Crane believed it would be a waste of effort to file an application for new facilities until the Commission had acted to resolve the conflict between the KMMX STA and the KZLK Upgrade Order. Id.

7. Shortly after acquiring KLZK in July of 1990, Mr. Crane of Southwestern learned of the KMMX STA/KLZK Channel 282C2 conflict in conversations with the staff of the Bureau's Audio Services Division. Crane Decl., ¶ 2. The staff told him that the private parties should attempt to work out a solution and make a proposal to them for approval. Crane Decl., ¶ 2. Mr. Crane then discussed the matter with an engineering consultant, and,

in October of 1990, made a detailed proposal for resolving the problem to the president of 100.3 Radio, Inc., the licensee of KIOL. Crane Decl., p. 2. When his proposal to 100.3 Radio went unanswered, Mr. Crane wrote the Bureau on January 10, 1991, proposing a similar solution to the problem. Id. The Chief of the Bureau's FM Branch responded to Crane's letter by letter of January 30, 1991, a copy of which is attached hereto as Exhibit G. The second paragraph of the said letter acknowledged the conflict between the KMMX STA and the KLZK Upgrade Order. Ex. G, p. 1. However, the Chief of the FM Branch merely noted that Mr. Crane's proposed solution would require the filing of a petition for rulemaking and encouraged such a filing because that "would provide each party a forum to express its views as well as afford the Commission an opportunity to achieve a comprehensive solution in the matter." Ex. G, p. 2. Copies of the letter were sent to the licensees of KIOL and KMMX. Id.

8. More than a year later, on March 17, 1992, the Chief of the FM Branch dismissed the KZLK Upgrade Application which had been filed by Brownfield in October of 1989. See letter attached hereto as Ex. H. The dismissal was based on relatively minor short-spacing problems unrelated to the KMMX STA operation; in fact, the dismissal letter did not even mention the conflict between the KZLK Upgrade Order and the KMMX STA. Id.

9. Mr. Crane participated in additional negotiations with the licensees of KMMX and KIOL in the Spring of 1992, and agreed to a proposed solution advanced by KMMX on June 17, 1992. Crane Decl. ¶ 4.; (The KMMX proposal is described in n. 6 on p. 4 of the Riley Letter). However, the private parties could not come to an agreement. Id. at ¶ 4.

E. The Bureau's December, 1992 Letter to Southwestern and Southwestern's Efforts to Resolve the Conflict in 1993 and 1994

10. On December 3, 1992, the Chief of the Bureau's Audio Services Division sent Southwestern another letter, attached hereto as Exhibit I, which noted that the authority to remain silent issued to the prior licensee, Brownfield, had expired in January 1989 and that Brownfield's KLZK Upgrade Application had been dismissed. Ex. I, p. 1. Then, without any reference whatsoever to the KMMX STA conflict or the KKYN, Plainview, Texas, upgrade to Channel 280C1, the Chief's letter asked for clarification of KZLK's operational status and suggested that Southwestern could take one of three actions to achieve compliance with Commission Policies:

- (1) Notification to this office that KLCU(FM) resumed broadcast operations as a Class A facility prior to the date of this letter;
- (2) Notification to this office that KLCU will immediately resume Class A broadcast operations;
- (3) Request special temporary authority, pursuant to Section 73.1635 of the Commission's Rules, to remain silent. Such request should include a justification for the continued silence of the station and a description of the steps you are taking to return it to the air.

11. When the Bureau's Audio Services Division sent the December 2, 1992, letter to Southwestern it should have been aware that KZLK had been foreclosed from operating as a Class A station on either Channel 280A or Channel 282A by the KMMX STA, issued in 1988, and by the KKYN upgrade adopted in December of 1989. See ¶¶ 3 and 5 supra. Thus, the first two "actions" suggested in the letter were meaningless. Moreover, the KZLK Upgrade Report also modified the station's license from Channel 280A to Channel 282C2, effectively revoking the station's authorization to operate as a Class A station on Channel

280A. In other words, Southwestern had no Commission authority to operate as a Class A station and both the licensee and the Commission were aware, or should have been aware, that any request for such authority could not be granted without causing severe short-spacing to the KMMX STA operation or the upgraded facilities of KKYN at Plainview.

12. In any event, Mr. Crane responded to the Bureau's December 2, 1992 letter in his own letter dated January 6, 1993, attached hereto as Exhibit J. In his response, Mr. Crane noted the KMMX STA operation and the KKYN upgrade, and described at some length his attempts to work out a solution to the problem with the licensees of KMMX and KIOL. Ex. J, pp. 2-3. Mr. Crane then requested an STA "to remain silent for six months or until such time as a construction permit for 282C2 is issued with 90 days to construct."

Id. p. 3.d He concluded by saying (Id. p. 4):

As stated in my original letters, the delay and complications to this dilemma do not originate with me, though I am the party most injured by them. I have tried to resolve this between the parties and have failed. Now it is time for the Commission to help force the settlement as outlined in [the solution proposed by counsel for KMMX, as described in the Riley Letter at note 6].

13. The Bureau did not respond to Mr. Crane's January 6, 1993 letter until it issued the Riley Letter on December 1, 1993. However, Mr. Crane's response did result in a meeting at the Commission in April 1993 between counsel for KMMX, counsel for KIOL, the then Chief of the Audio Services Division, the Chief of the FM Branch and other Bureau personnel. Crane Decl. Ex. F, ¶ 5. Various methods of solving the conflict were discussed at the meeting and counsel for KMMX and KIOL agreed to consult with their clients concerning additional negotiations. Id. By Fall of 1993, KIOL and KMMX reached an agreement in principle looking toward a solution to the problem and Mr. Crane had agreed to

pay \$5,000 towards the expenses to be incurred by KIOL in completing the solution. Id. However, before a definitive agreement could be executed, the Bureau issued the Riley Letter. Id.

F. The Bureau's Letter of December 1, 1993 (the "Riley Letter") to Southwestern and the Licensees of KMMX and KIOL

14. At page 3 of the Riley Letter, the Bureau concluded that the "primary problem" facing the Commission, Southwestern and the licensees of KMMX and KIOL was that the KMMX STA was "short-spaced by 49.4 kilometers to the higher-priority reserved upgrade and frequency change allotment for KLZK in Brownfield" (footnote omitted). The Bureau then noted that while several parties had proposed solutions to "this unfortunate circumstance" a joint proposal had not been submitted to the Commission, and the Bureau's own engineering studies indicated that neither KMMX nor KIOL could resolve the conflict by moving to other frequencies. Accordingly, the Bureau proposed to cancel the STA's granted to KMMX and KIOL and dismiss their pending applications for permanent authority on the facilities described in the STA's, stating, inter alia, "KMMX's . . . application cannot be granted, nor can it be used further to delay the implementation of upgraded service to Brownfield [by KZLK]" Id., p. 4 (emphasis added). The Bureau also noted that "[e]ven as a Class A facility, [KLZK] would still be 45.4 kilometers short-spaced to [the KMMX STA facilities], and that "KLZK may not resume operation on Channel 280A" due to the upgrade granted KKYN-FM in Plainview by the Allocations Branch. Riley Letter, pp. 3 and 5 at notes 5 and 9.

15. Having correctly attributed the "primary problem" to the Bureau's own mistake in allowing two of its own branches to authorize mutually exclusive operations by

KMMX and KLZK and noting that operation of KLZK on either Channel 280A or 282A would violate the Commission's technical rules, the Bureau then baldly stated that the

second problem involved here is KZLK's failure either to implement the upgrade or resume operation with its currently authorized Class A facilities. In its January 6, 1993, response/request for [STA] to remain silent, KLZK details the perceived problems involving the station's future upgrade, but fails to explain why the station must remain silent while these problems are confronted. KLZK has not, for example, shown why it could not resume operations as a Class A station on Channel 282A. (Riley Letter, pp. 4-5, emphasis added)

16. The quoted statement is but one more example of the Bureau's flawed reasoning and flawed procedures which have plagued Southwestern and prevented it from operating KZLK to serve Brownfield, Texas since 1990. First, the Bureau granted the KMMX STA in March of 1988 (Sheridan Letter, Ex. B), then it issued the mutually exclusive KLZK Upgrade Order in September of 1988, then in 1989 it ordered KKYN-FM, Plainview, Texas to upgrade on Channel 280A, which operation was mutually exclusive with KLZK's return to operation on its licensed frequency, then it issued the Riley Letter in 1993 blaming Southwestern for failing to return KLZK to the air, and then in 1996 it designated the KZLK renewal application for hearing on the unsubstantiated premise that Southwestern, and not the Bureau, was responsible for KLZK's silence for the last 8 years. The simple answer to the Bureau's claim is self-evident from the Bureau's own analysis in the Riley Letter: operation of KLZK on Channel 282A would have violated 47 C.F.R. § 73.207 because the KMMX STA operation was short-spaced to a KLZK Class A operation by 45.4 kilometers and KMMX continued to operate with its STA authorized facilities until June of 1996.

17. The Bureau concluded the Riley Letter by ordering KMMX and KIOL to cease operating under their STA's and return to operation with previously licensed facilities. Riley Letter, p. 4. However, in order to allow time for the required changes to be made, the STA's were continued for 90 days, with the advisory that "requests for further extension will not be granted." *Id.*, ¶ 16. With the ordered changes in the KMMX operation in mind, the Bureau then ruled that Southwestern had not made a showing sufficient to warrant favorable action on the STA request contained in its January 7, 1993 letter (Ex. J) and stated that said request and further action on the KLZK renewal application would be held in abeyance pending receipt of additional information to be supplied within 30 days. *Id.*, p. 5. The additional information requested included a description of the steps Southwestern would take to return KLZK to the air "once KMMX has returned to its former [non-STA] facilities."

G. The December 31, 1993 Agreement Between Southwestern and the Licensees of KMMX and KIOL to Resolve the Conflict

18. Shortly after the Riley Letter was issued, the Bureau's premise for ordering Southwestern to demonstrate immediately its plans for returning KLZK to the air changed. First, on December 31, 1993, Southwestern and the licensees on KMMX and KIOL entered into an Agreement, a copy of which is attached hereto as Exhibit K. The essential terms of that Agreement provided that:

- a. The licensees of KIOL and KMMX would cooperate in filing a petition for rulemaking with the Commission requesting that Channel 252C1, the frequency then being used by KIOL pursuant to an STL, be deleted from 47 C.F.R. § 73.202(b) as an allotment to Lamesa, Texas, and, instead, be allotted to Tahoka, Texas. (Ex. K, pp. 3-4).
- b. The licensees of KIOL and KMMX would file applications with the Commission requesting consent to assignment of their licenses for Channel 284C1 and 262C1 to each other and request the Commission

to permit an exchange of call signs for the two stations when the license assignments were completed. (Ex. K, p. 4).

- c. Following allotment of Channel 262C1 to Tahoka by the Commission, the licensee of KMMX as the proposed assignee of KIOL would file an application for new facilities on the channel near Tahoka which is north of Lamesa (Ex. K, p. 4).
- d. Following grant of the new facilities application at Tahoka and the assignment applications for KMMX and KIOL, the KMMX license would construct the new facilities for Channel 262C1 near Tahoka and install the equipment necessary to allow KIOL to begin broadcasting on Channel 284C1 at the site south of Lamesa. (Ex. K, pp. 5-6).
- e. Upon completion of construction at both stations, the licensees would exchange licenses, KIOL would begin operation on Channel 284C1 south of Lamesa and KMMX would begin operations on Channel 262C1 near Tahoka. (Ex. K, pp. 5-6).
- f. The licensee of KMMX would pay for most of the costs incurred by both licensees in making the changes and would also pay the KIOL licensee \$10,000, and provide other consideration to promote the channel change for KIOL. (Ex. K, pp. 7-11).
- g. Since removal of Channel 284C2 from the KMMX STA site north of Lamesa to the KIOL site south of Lamesa would benefit Southwestern by curing the short-spacing between that channel and the authorization for KZLK in the KZLK Upgrade Order, Southwestern agreed to pay the KMMX licensee \$5,000 as a partial reimbursement of its costs. (Ex. K, p. 11).

H. Southwestern's Response to the Riley Letter and Efforts to Obtain Commission Authorization to Implement the Agreement

19. Immediately after the Agreement was executed, the parties thereto began discussions with the Bureau's staff on the procedures to be followed in implementing it. On Friday 14, 1994, counsel for KMMX filed a letter^{8/} with the Commission's Acting Secretary

^{8/} The letter, Exhibit L hereto, is dated February 11, 1994, but was filed on February 14, 1994.

describing these discussions, attaching a copy of the Agreement and requesting that the KMMX and KIOL STA's be extended in order to permit those stations to continue to operate with their STA facilities while the Bureau reviewed and acted on the proposals contained in the Agreement. Ex. L. The Chief of the Audio Services Division responded to the request for extension in a letter dated February 23, 1994 (Ex. C hereto) in which he extended the STA's for 180 days, stating:

We will treat your requests as petitions for partial reconsideration of the December 1 letter with respect to the automatic termination of the STAs. We believe that the additional time will enable us to review the agreement and proposed solution, and thus potentially facilitate resolution of the LaMesa spacing concerns with expenditure of a minimum of resources on the part of the both the stations and the Commission.

The Bureau subsequently extended the KMMX and KIOL STA's through September 6, 1996. See Ex. D hereto.

20. The execution of the December 31, 1993, Agreement and the subsequent extension of the KMMX and KIOL STA's substantially altered the basis for the Bureau's directives to Southwestern contained in December 1, 1993 Riley Letter. When those directives were issued, the Bureau contemplated that KMMX would cease operating on Channel 284C1 pursuant to its STA within 90 days, or by March 1, 1994, and therefor Southwestern would be able to begin operation on Channel 282C2 shortly thereafter. However, the solution proposed in Agreement and the Bureau's stated willingness to extend the KMMX STA while the Commission considered the petition and the several applications described therein made it obvious to everyone involved that KLZK could not expect to begin

operations on Channel 282 either as a Class A or Class C2 station within the time frame contemplated by the Riley Letter.

21. Thus, when Mr. Crane of Southwestern replied to the directives of the Riley Letter in a letter dated February 21, 1994, Exhibit M hereto, he did so in the context of these new developments. While he described at some length the planning Southwestern had undertaken for the Class C2 operation, he also noted the Agreement entered into with the licensee of KMMX and KIOI and stated that:

It is our intention to file our new 301 application [for Class C2 facilities] at the same time as the Petition for Rulemaking [described in the Agreement]. If this is not the preference of the Commission we can file the 301 pursuant to your direction.

Ex. M, p. 2. Mr. Crane also added that:

At this time it would not be fiscally wise and not in the public interest to put KLZK on the air as a class A station, in that the old tower site is not available and we need to conserve our resources so as to construct our facility to its full potential to help insure its financial viability and operation for the region. This combination of facts, plus the confusion and difficulty surrounding our Construction Permit has created extraordinary circumstances for KLZK, and the public interest would be best served by the installation of our full license and allowing us to construct one facility and insure our long term service to Brownfield and the region. Id.

22. While Southwestern did not file its Form 301 application when the Petition for Rulemaking was filed in April of 1994, this omission had nothing to do with KLZK remaining silent for the following 26 months, as will be demonstrated below. First, as mentioned above, the Bureau extended the KMMX STA for operation on Channel 284C1 through September 6, 1996 (See Exs. C and D) and that action insured that KLZK could not resume operations as either a Class A or Class C station for an indeterminant period of time,

which ultimately expired on June 28, 1996. See Ex. E. Second, grant of any Form 301 application filed by Southwestern would have been contingent on approval of the petition for rulemaking and grant of the several applications described in the Agreement. Even if such a contingent application would have been accepted by the Commission under 47 C.F.R. § 73.3517, the effectiveness of any grant would have been conditioned on KMMX ceasing operation under its STA, which did not occur until June 28, 1996.

23. Similarly, Southwestern's explanation for not constructing Class A facilities for operation on Channel 282 did not contribute to the delay in returning KZLK to the air. Southwestern did not have either a license or a construction permit to operate on Channel 282A. The KLZK Upgrade Order (3 FCC Rcd 6158) of September 28, 1988 had modified the station's channel 280A license to Channel 282C2, not Channel 282A, and even that modification was contingent on the filing of a subsequent application for a construction permit on the new channel. In other words, before Southwestern could have begun KLZK operations on Channel 282A, it would have had to file a Form 301 application which would have been subject to the same restrictions and contingencies as the similar application for a permit to construct new facilities on Channel 282C2. Moreover, even if Southwestern had secured authority to construct and operate KZLK with Class A facilities, the station could not have resumed service with those facilities until KMMX ceased its STA operations because they would have been short-spaced to the KMMX STA operation by 45.4 kilometers. See ¶ 3, supra. Under these circumstances, as Mr. Crane explained in his February 21, 1994 letter (Ex. M), it made no sense to expend the Southwestern's resources to apply for a Class A

authorization and then build Class A facilities when such facilities could not begin operation any earlier than the much more powerful Class C2 facilities.

24. In fact, the delay in returning KLZK to the air following issuance of the Riley Letter on December 1, 1993 is primarily attributable to the Bureau. As indicated in paragraph 4 of the HDO, the petition for rulemaking described in the Agreement was filed on April 14, 1994, but the Bureau did not issue its Notice of Proposed Rulemaking, 10 FCC Rcd 4945 (MMB 1995) until May 3, 1995, more than one year later. Another five months elapsed before a Report and Order, 10 FCC Rcd 11018 (MMB 1995), adopting the changes described in the Agreement was released on October 10, 1995. Thereafter, the parties and the Commission moved rapidly to complete the transactions described in the Agreement. An application for a permit to construct new facilities on Channel 252C1 at Tahoka was filed on October 16, 1995 (File No. BPH-95-1016IG) and granted on March 6, 1996. See Ex. D. The licensees of KMMX and KIOL exchanged their licenses on June 28, 1996,^{9/} and KMMX ceased broadcasting on Channel 284C1 pursuant to the KMMX STA on the same date. Ex. E.

I. Southwestern's Post-Designation Efforts to Return KLZK to the Air Have Been Further Delayed by the Bureau

25. Ironically, however, the Bureau again has taken actions which will further delay Southwestern from returning KZLK to the air. First, it released the HDO in this proceeding on April 29, 1996, and then, at the second prehearing conference in this

^{9/} The assignment applications had been filed on April 14, 1995, and granted on June 27, 1995. See June 28, 1994 letter to the Commission from counsel for the licensee of KIOL, attached hereto as Exhibit N.

proceeding held on June 22, 1996, the Bureau announced that, contrary to the position it had taken at the first prehearing conference held on June 6, 1996, it would not negotiate a consent order pursuant to 47 C.F.R. §§ 1.93 and 1.94 and would not process Southwestern's application for a permit to construct new facilities on Channel 282C2, filed May 8, 1996^{10/} filed one week after release of the HDO and almost two months before KMMX ceased operation on Channel 284C1 under its STA. See Order, 96M-169, released July 1, 1996.

26. Since acquiring KZLK in July of 1990, Southwestern has endured a six year odyssey attempting to obtain Commission authority to construct new Class C2 facilities for KLZK to serve Brownfield, Texas. It has now secured permission to use a transmitter site, prepared a detailed projection of the costs of constructing the station, obtained a bank letter indicating reasonable assurance of financing the project and filed an application requesting Commission consent to construct the station. See Ex. F, Crane Decl., ¶ 6 and attachments I and II thereto.^{11/} In other words, Southwestern is now ready to construct and operate KLZK, but the Bureau continues to thwart these objectives.

^{10/} File No. BPH-960508IA, accepted for filing by Public Notice released June 12, 1996, Official Notice requested.

^{11/} Southwestern's May 8, 1996, application requests a minor change in facilities. See KZLK Upgrade Order, 3 FCC Rcd 6158 (MMB 1988). Such applicants are normally not required to demonstrate their financial qualifications. Attachments I and II to Exhibit F were obtained to demonstrate compliance with Issue 1 designated in the HDO.

III. Argument

A. Southwestern Has the Capability and Intent to Expeditiously Return KZLK to the Air

27. Issue (1) designated in the HDO requires a determination of whether Southwestern has the "capability and intent" to return KLZK to the air expeditiously. The facts discussed above demonstrate conclusively that the silence of KZLK from July 1, 1990, when Southwestern acquired the station, to June 28, 1996, when KMMX ceased operation under its Channel 284C1 STA, was attributable solely to factors beyond Southwestern's control. When Southwestern acquired KZLK, KMMX had already begun operating on Channel 284C1, pursuant to a Bureau authorized STA, at a site which made operation of KZLK on Channel 282A or 282C2 technically impossible under the Commission's rules. Similarly, the Bureau had authorized KYNN-FM, Plainview, Texas, to operate with facilities that made operation of KLZK on Channel 280A technically impossible. For the entire six year period Southwestern was in constant communication with the Bureau and the licensees of KMMX and KIOL in attempting to resolve the KMMX STA problem.

28. While, in hindsight, Southwestern might be faulted for not filing its Form 301 application in October or November of 1995 following release of the rulemaking Report and Order (10 FCC Rcd, 1018), which finally provided a Commission authorized solution to the KMMX STA/KLZK Channel 282C2 conflict, that application could not have been granted until the KIOL application for new facilities on Channel 261C1 was granted on March 6, 1996,^{12/} and operation of KLZK on its new facilities could not have begun until June 28,

^{12/} See Ex. D. hereto.

1996, when KMMX ceased operating under the STA. In any event, construction permits normally provide an 18 month construction period,^{13/} and most importantly, the HDO does not provide notice that post-designation delay can be attributed to Southwestern in resolving these issues. Accordingly, it must be concluded that no act or omission by Southwestern between July 1, 1990 and the release of the HDO on April 29, 1996 caused or contributed to the silence of KZLK during that period. For this reason, there is no basis for concluding that the silence of KZLK during that period casts any doubt on Southwestern's "capability and intent to expeditiously resume broadcast operations of KZLX(FM)."

29. Finally, Southwestern has demonstrated that it has the financial capability to construct and operate KZLK as a Class C2 facility. Accordingly, Issue (1) must be resolved in Southwestern's favor.

B. Southwestern Did Not Violate Sections 73.1740 or 73.1750 of the Commission's Rules

30. Issue (2) of the HDO, requires a determination of whether Southwestern violated 47 C.F.R. §§ 73.1740 and/or 73.1750. As demonstrated above, the Bureau has been aware of KZLK's silent status since before Southwestern acquired the station, and events entirely beyond the applicant's control prevented it from returning the station to the air until more than two months after the HDO was released. Thus, there is no basis for concluding that Southwestern violated the provisions of 47 C.F.R. § 73.1740. Similarly, there is no basis for concluding that Southwestern ever had an intention to permanently discontinue operation of KZLK. To the contrary, Southwestern's actions demonstrate a

^{13/} 47 C.F.R. § 73.3598.

continuous interest in restoring KZLK to operating status since the fall of 1990.

Accordingly, it is clear that Southwestern has not violated 47 C.F.R. § 73.1750, and therefore Issue (2) must be resolved in Southwestern's favor.

**C. The Public Interest Would be Served by
 Grant of the KLZK Renewal Application**

31. Conclusory Issue (3) in the HDO requires a determination of whether grant of the KZLK renewal application would serve the public interest, convenience and necessity. While the Bureau's stated refusal to process Southwestern's Form 301 application, File No. BPH-960508IA, filed May 8, 1996, may prevent Southwestern from returning KLZK to the air before the statutory deadline of February 9, 1997, just as the Bureau's authorization of the KMMX STA in 1988 and its authorization of the KYNN upgrade in 1989 kept KZLK off the air from 1990 to 1996, it is abundantly clear the Southwestern's past record does not provide any basis for concluding that the public interest would be disserved by grant of its renewal application. Moreover, grant of the renewal application will permit Southwestern to appeal the Bureau's decision refusing to process the recently filed Form 301 application to the Commission and, if necessary, to the U.S. Court of Appeals. Perhaps those bodies will then order the Bureau to grant Southwestern's application. A grant will permit Southwestern to demonstrate that the public interest will be served by constructing its new facilities and returning KLZK to the air by February 7, 1997.